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## *Saint Francis College v. Al-Khazraji*: Cosmetic Surgery or a Fresh Breadth for Section 1981?

### I. INTRODUCTION

What constitutes "race" for determining discrimination under section 1981, Title 42 of the United States Code?<sup>1</sup> Does "Arab" or "Hispanic" denote a *race* or a *national origin*? Does "Jewish" connote more than a religion? The judiciary's difficulty in answering these complex legal and sociopolitical questions is reflected by the inconsistent interpretations of section 1981.<sup>2</sup> Thus, in *Saint Francis College v. Al-Khazraji*,<sup>3</sup> the Supreme Court hoped to conclusively resolve this conflict. The Court determined that discrimination claims based on *ancestral* and *ethnic* characteristics fall within the definition of race as conceived by the original framers of section 1981. However, because the distinction between ancestry and national origin<sup>4</sup> remains unclear, *Saint Francis College* regrettably rekindles the debate as to the role of national origin in section 1981 race discrimination claims.

This note will first explore the legislative history of section 1981

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1. 42 U.S.C. § 1981 (1982). Section 1981 reads as follows:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

2. See, e.g., *Ortega v. Merit Ins. Co.*, 433 F. Supp. 135 (N.D. Ill. 1977) (allowing victims of national origin discrimination to assert claims under section 1981); *Hernandez v. Erlenbusch*, 368 F. Supp. 752 (D. Or. 1973) (Hispanics entitled to use section 1981). *Contra* *Budinsky v. Corning Glass Works*, 425 F. Supp. 786 (W.D. Pa. 1977) (Slavics not entitled to claims under section 1981); *Vazquez v. Werner Continental, Inc.*, 429 F. Supp. 513 (N.D. Ill. 1977) (Hispanics not entitled to claims under section 1981).

3. 107 S. Ct. 2022 (1987); see also *Shaare Tefila Congregation v. Cobb*, 107 S. Ct. 2019 (1987) (companion case to *Saint Francis College*, wherein the Court held that Jews could maintain an action based on racial discrimination under section 1982 of Title 42 of the United States Code). Section 1982 states: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. § 1982 (1982). See *infra* note 46 and accompanying text regarding the historical interrelationship of sections 1981 and 1982.

4. See *infra* note 110 for definitions of ancestry and national origin.

from its inception in 1866<sup>5</sup> to its reenactment in the Voting Rights Act of 1870.<sup>6</sup> Included in this discussion will be an analysis of the interplay of the 1866 and 1870 Acts with the ratification of the thirteenth<sup>7</sup> and fourteenth<sup>8</sup> amendments.

Secondly, this note will outline significant Supreme Court decisions which served as a basis for the outcome in *Saint Francis College*. This discussion will indicate that the Court considers section 1981 to be a broad remedy for any type of racial discrimination and is not restricted by Title VII of the Civil Rights Act of 1964 (Title VII).<sup>9</sup>

Section III will review the factual and procedural history of *Saint Francis College*. Consideration will also be given to the appropriate statute of limitations for section 1981 claims under the *Chevron Oil Co. v. Huson*<sup>10</sup> analysis. Section IV is devoted to an analysis of Justice White's majority opinion, which indicates that claims based on ancestry are actionable under section 1981. This section will also explore Justice Brennan's concurring opinion, noting the lack of a bright line between ancestry and national origin.

Section V considers the practical impact of *Saint Francis College*, focusing on the advantages of section 1981 actions and remedies, as compared with the claims under Title VII. Finally, the note concludes that *Saint Francis College* will inevitably result in increased claims under section 1981 and, consequently, will diminish the effectiveness of conciliation efforts under Title VII's administrative procedures. With wider access to section 1981, it is predictable which vehicle claimants will most readily pursue.

## II. HISTORICAL BACKGROUND

### A. The Legislative History of Section 1981

Section 1981 has as its genesis section 1 of the Civil Rights Act of 1866<sup>11</sup> (the 1866 Act). The dispute as to the purpose and the scope of

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5. Act of April 9, 1866, ch. 31, 14 Stat. 27 (1866). See *infra* note 11 and accompanying text.

6. Act of May 31, 1870, ch. 114, 16 Stat. 140 (1870). See *infra* note 25 and accompanying text.

7. U.S. CONST. amend. XIII. See *infra* note 13.

8. U.S. CONST. amend. XIV.

9. See generally 42 U.S.C. § 2000e (1982). Section 2000e-2 prohibits discrimination in employment based on race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2 (1982).

10. 404 U.S. 97 (1971); see also *Goodman v. Lukens Steel Co.*, 107 S. Ct. 2617 (1987). In *Goodman*, the Court affirmed the Third Circuit's application of the *Chevron* factors in changing the applicable statute of limitations in civil rights actions from six years to two years. *Id.* at 2625. For a discussion of these factors, see *infra* notes 87-91 and accompanying text.

11. Act of April 9, 1866, ch. 31, 14 Stat. 27 (1866). Section 1 of the Act states: That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the

section 1981 arose from this beginning: "[t]he central substantive problem . . . is to determine what the thirty-ninth Congress meant by discrimination on the basis of 'race.'"<sup>12</sup>

Section 1 of the 1866 Act is viewed as giving effect to the thirteenth amendment<sup>13</sup> by eradicating the Black Codes imposed by southern states,<sup>14</sup> and ultimately, by eliminating all racial discrimination in the making and enforcing of contracts.<sup>15</sup> So expansive was the concept of race in 1866 that language in the original bill, which noted that the proposed civil rights were to apply "without distinction of color,"<sup>16</sup> was eliminated as unnecessary.<sup>17</sup> Further, the language of the Act itself<sup>18</sup> reveals that its scope is not limited solely to contractual rights but extends to a variety of civil rights.<sup>19</sup>

However, from its inception, the constitutionality of the 1866 Act was in doubt.<sup>20</sup> Hence, courts and commentators agree that a pri-

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United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

12. See Brief for Respondent at 36, *Al-Khazraji v. Saint Francis College*, 784 F.2d 505 (3d Cir.) (No. 85-2169), *aff'd*, 107 S. Ct. 2022 (1987).

13. The thirteenth amendment to the United States Constitution abolished slavery and granted Congress enforcement power against the vestiges of slavery. U.S. CONST. amend. XIII; see *Civil Rights Cases*, 109 U.S. 3, 22 (1883); CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (statement by Sen. Trumbull); H. MEYER, *THE HISTORY AND MEANING OF THE FOURTEENTH AMENDMENT* 42 (1977).

14. Black Codes were enacted in the southern states to circumvent the thirteenth amendment and to perpetuate the vestiges of slavery. See *General Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 386-87 (1982); C. ANTIEAU, *THE ORIGINAL UNDERSTANDING OF THE FOURTEENTH AMENDMENT* 70-71 (1981).

15. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 295 (1976). See *infra* notes 54-55 and accompanying text.

16. S. 61, 39th Cong., 1st Sess. (1866); see CONG. GLOBE, 39th Cong., 1st Sess. 209 (1866).

17. See *United States v. Wong Kim Ark*, 169 U.S. 649, 697-98 (1898); CONG. GLOBE, 39th Cong., 1st Sess. 498, 573-74 (1866). See generally *Greenfield & Kates, Mexican Americans, Racial Discrimination, and the Civil Rights Act of 1866*, 63 CALIF. L. REV. 662, 671-75 (1975).

18. See *supra* note 11.

19. See, e.g., *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 387 (1982); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 424-26 (1968); *Georgia v. Rachel*, 384 U.S. 780, 791 (1966). For a sampling of the scope of section 1981, see *infra* note 121 and accompanying text.

20. CONG. GLOBE, 39th Cong., 1st Sess. 2459, 2465 (1866) (statements by Reps. Ste-

mary purpose of the fourteenth amendment<sup>21</sup> was to eliminate this uncertainty<sup>22</sup> by safeguarding the “principles and provisions [of the 1866 Act] beyond repeal by a later Congress.”<sup>23</sup>

Following ratification of the fourteenth amendment,<sup>24</sup> Congress re-enacted the provisions of section 1 of the 1866 Act as section 16 of the 1870 Act.<sup>25</sup> Notably, the opening phrase of section 16 reads “all *persons* within the jurisdiction of the United States.”<sup>26</sup> This language is more inclusive than section 1 of the 1866 Act, which refers to *citizens*.<sup>27</sup> The Court has indicated that this change in the 1870 Act reflects the references of the fourteenth amendment to “all persons” and is thus intended to apply equally to citizens *and aliens*.<sup>28</sup>

Ultimately, section 16 of the 1870 Act evolved into section 1981 of Title 42 of the United States Code.<sup>29</sup> Thus, through ratification of the fourteenth amendment and reenactment of section 1 into section 16 of the 1870 Act, application of the principles of section 1981 were

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vens & Thayer); see also *General Bldg. Contractors*, 458 U.S. at 384; *Wong Kim Ark*, 169 U.S. at 675; C. ANTIEAU, *supra* note 14, at 203; H. MEYER, *supra* note 13, at 2. See generally R. KACZOROWSKI, *THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866-1876*, at 1-20 (1985).

21. U.S. CONST. amend. XIV, § 1. This section states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive *any person* of life, liberty, or property, without due process of law; nor deny to *any person* within its jurisdiction the equal protection of the laws.

(emphasis added).

22. See *supra* note 20. The same Congress that enacted the 1866 Act also proposed the fourteenth amendment for ratification by the states.

23. C. ANTIEAU, *supra* note 14, at 2.

24. The fourteenth amendment to the United States Constitution was ratified by 30 of the 36 states then in existence on July 28, 1868. See J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 1124 (3d ed. 1986).

25. Act of May 31, 1870, ch. 114, 16 Stat. 140, 144 (1870). Section 16 of the 1870 Act is a restatement of section 1 of the 1866 Act and embodies the same principles:

That all persons within the jurisdiction of the United States shall have the same right in every State and Territory of the United States to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens . . . .

See *supra* note 11 for the full text of section 1 of the 1866 Act.

26. Act of May 31, 1870, ch. 114, 16 Stat. 140, 144 (1870) (emphasis added).

27. See *supra* note 11.

28. See, e.g., *Runyon v. McCrary*, 427 U.S. 160, 202 (1976) (White, J., dissenting) (discussed in text accompanying notes 50-52); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). This reasoning is consistent with section 17 of the 1870 Act which, in proscribing penalties for violation of the civil rights provision in section 16, protects “any inhabitant . . . on account of such person being an *alien*, or by reason of his *color* or *race* . . . .” Act of May 31, 1870, ch. 114, 16 Stat. 140, 144 (1870) (emphasis added).

29. Section 1981 was designated under the Revised Statutes of 1873-1874 as section 1977. 24 U.S. REV. STAT. § 1977 (1878). It was first incorporated into the current United States Code under the heading Aliens & Nationality, section 41 of Title 8.

extended to all persons, alien or citizen, within the jurisdiction of the United States.

### B. *The Meaning of "Race"*

The concept of race is complex, reflecting a variety of theories and viewpoints.<sup>30</sup> Race has been commonly viewed in social<sup>31</sup> or biological<sup>32</sup> terms. In the nineteenth century, however, consistent scientific evaluations of "race" were uncommon.<sup>33</sup> Race generally encompassed common characteristics such as color, hair form, and other distinguishing physical traits.<sup>34</sup>

The congressional debates of 1866 are replete with references to numerous races beyond that of Caucasian and Negro.<sup>35</sup> Additionally, early judicial opinions indicate that "all races, classes, and conditions of men" were encompassed by the 1866 Act and the fourteenth amendment.<sup>36</sup> For example, in a 1909 immigration case, the court of appeals discussed the definition of race thoroughly. The court noted that use of the term "European race" was improper because "a single race called 'European or white' is contrary to ordinary usage."<sup>37</sup> The court acknowledged that the United States Census Bureau reports designated "whites" as including "all persons not otherwise classified."<sup>38</sup> In fact, from 1899 until 1952, the United States Bureau of Immigration classified immigrants by race, not national origin.<sup>39</sup>

30. See *Legal Definition of Race*, 3 RACE REL. L. REP. 571 (1958).

31. See 15 ENCYCLOPEDIA BRITANNICA, *Macropedia* 356 (1977). However, "race" has also been used to classify groups based on linguistic, cultural, political, or religious characteristics. *Id.* On the other hand, "racism has no necessary relation to biological or anthropological definitions . . ." *Id.* at 360.

32. See 15 ENCYCLOPEDIA BRITANNICA, *supra* note 31, at 348; 13-14 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES, 264-65 (1968).

33. See DICTIONARY OF RACES AND PEOPLE, S. DOC. NO. 662, 61st Cong., 3d Sess. 3 (1911); 15 ENCYCLOPEDIA BRITANNICA, *supra* note 31, at 351; Greenfield & Kates, *supra* note 17, at 676 (differences in 19th century classifying systems).

34. See 15 ENCYCLOPEDIA BRITANNICA, *supra* note 31, at 35.

35. *E.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 220 (Germanic), 305 (German, Irish), 498 (Indo-European, Mongolian, Chinese), 522-23 (Mongolian, Hindos, Chinese) (1866).

36. See *United States v. Wong Kim Ark*, 169 U.S. 649, 676 (1898).

37. *In re Halladjian*, 174 F. 834, 838 (C.C.D. Mass. 1909).

38. *Id.* at 844, 845. See *Legal Definition of Race*, *supra* note 30, at 588 (1950 census categories reflect the continued confusion created by racial classification systems).

39. In 1952, the use of racial criteria in naturalization policies was abrogated. A quota system based on national origin was utilized exclusively. E. HUTCHINSON, *LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 1798-1965*, at 480 (1981). See A. LEIBOWITZ, *IMMIGRATION LAW AND REFUGEE POLICY 1-19 to 1-20* (1983) (citing W. BENNETT, *IMMIGRATION COMM'N REPORT*, S. DOC. NO. 747, 61st Cong., 3d Sess. (1910-1911)). This report refers to over 40 racial classifications. It notes that "data based on a

However, race as used for immigration purposes referred to language and geographical characteristics, rather than color or physical identifiers.<sup>40</sup>

Thus, as early as the turn of the century, the confusion as to the definition of race was embedded in American bureaucracy. Today, modern usage still prefers the notion that race is not restricted to three or four major groups.<sup>41</sup>

### C. *The Supreme Court Sets the Stage*

In a series of key decisions stemming from the mid-1960's, the Supreme Court began to set the stage for its definition of race as set forth in *Saint Francis College*. First, in *Georgia v. Rachel*,<sup>42</sup> Justice Stewart indicated: "Congress intended to protect a limited category of rights, specifically defined in terms of racial equality . . . . [T]he phrase 'as is enjoyed by white citizens' was later added in committee in the House, apparently to emphasize the racial *character* of the rights being protected."<sup>43</sup>

*Jones v. Alfred H. Mayer Co.*<sup>44</sup> focused on section 1982,<sup>45</sup> a companion to section 1981, which also derived from section 1 of the 1866 Act.<sup>46</sup> The Court determined that section 1 of the 1866 Act was intended to reach any kind of race discrimination, government or *private*, since to restrict it to mere government action would make the enforcement provisions of section 2 of the Act meaningless.<sup>47</sup> In reviewing the legislative history of the 1866 Act, the Court noted that the framers considered it a "comprehensive statute forbidding *all* ra-

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knowledge of the country of birth alone indicated practically nothing of the racial status of persons . . . ." *Id.*

40. A. LEIBOWITZ, *supra* note 39, at 1-19 to 1-33 (citing W. BENNETT, IMMIGRATION COMM'N REPORT, S. DOC. NO. 747, 61st Cong., 3d Sess. (1910-1911)). This report was the product of the Dillingham Commission, and is viewed as the most comprehensive review of United States immigration. *Id.* at 1-33, n.1.

41. See, e.g., VIII THE OXFORD ENGLISH DICTIONARY 87 (1933 & reprint 1978). Here, "race" is initially defined as:

I. A Group of persons, animals, or plants, connected by common descent or origin.

In the widest sense the term includes all descendants from the original stock, but may also be limited to a single line of descent or to the group as it exists at a particular period.

1. The offspring or posterity of a person; a set of children or descendants.

42. 384 U.S. 780 (1966).

43. *Id.* at 791 (emphasis added); see *supra* note 16.

44. 392 U.S. 409 (1968).

45. See *supra* note 3.

46. *Jones*, 392 U.S. at 422; see also *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431 (1973). In a unanimous decision, the Court in *Tillman* indicated that the "historical interrelationship" of sections 1981 and 1982 mandates like-interpretation. *Id.* at 440.

47. *Jones*, 392 U.S. at 423-24. Section 2 of the 1866 Act proscribes penalties for violation of the civil rights enumerated in section 1. Act of April 9, 1866, ch. 31, 14 Stat. 27 (1866).

cial discrimination affecting basic civil rights . . . ."<sup>48</sup> Significantly, the Court further rejected the notion that section 1981 was designed to reach only government actions and concluded that it, too, reaches private acts.<sup>49</sup>

Building on its decision in *Jones*, the Court emphasized in *Runyon v. McCrary*<sup>50</sup> its view that section 1981 reaches private acts.<sup>51</sup> The Court noted that Congress declined to repeal the civil rights provisions of the 1866 Act during the 1972 debates over amendments to the Civil Rights Act of 1964.<sup>52</sup> The Court considered this as clear evidence of Congress's intent that section 1981 apply to private as well as governmental acts.<sup>53</sup>

In *McDonald v. Santa Fe Trail Transportation Co.*,<sup>54</sup> the Court extended protection against race discrimination under section 1981 to whites. The Court determined that the statute's express reference to "all persons" must, therefore, include whites as well as nonwhites.<sup>55</sup>

The Court further refined its interpretation of section 1981 in *General Building Contractors Association v. Pennsylvania*.<sup>56</sup> Justice Rehnquist indicated that section 1981 must be considered in light of the "'events and passions of the time' in which the law was forged."<sup>57</sup> The Court concluded that the legislative history of section 1981 required that it be limited to claims of *intentional* discrimination and not to those based on disproportionate impact.<sup>58</sup>

Consequently, by the mid-1980's, the Court's interpretation of section 1981 was expansive: section 1981 could be applied in private as well as government actions; whites and nonwhites could seek relief for racial discrimination under the statute. However, section 1981 could be used only for claims of intentional race discrimination.

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48. *Jones*, 392 U.S. at 435. But see Justice Douglas' concurring opinion which questions the majority's interpretation of the 1866 Act. Justice Douglas opined that the Act was applicable only to government acts, and did not reach private acts. *Id.* at 454-60.

49. *Jones*, 392 U.S. at 437 n.73.

50. 427 U.S. 160 (1976).

51. *Id.* at 173-75.

52. 118 CONG. REC. 3371-73 (1972); see also 42 U.S.C. § 2000e (1982).

53. *Runyon*, 427 U.S. at 175.

54. 427 U.S. 273 (1976).

55. *Id.* at 287; see *United States v. Wong Kim Ark*, 169 U.S. 649, 675-76 (1898).

56. 458 U.S. 375 (1982).

57. *Id.* at 386 (quoting *United States v. Price*, 383 U.S. 787, 803 (1966)).

58. *General Bldg. Contractors*, 458 U.S. at 388-89.



### III. BACKGROUND OF THE CASE

#### A. *Factual History*

Respondent Majid Ghaidan Al-Khazraji was born in Iraq; he is of Arab ancestry, and practices the Muslim religion. Now a United States citizen, Al-Khazraji holds a Ph.D. in sociology from an American university.<sup>59</sup>

Al-Khazraji was an associate professor in the department of sociology at Saint Francis College<sup>60</sup> (the College) from 1971 until 1979. In 1977, he was recommended by his department for a tenure position. Although such action typically ensured acceptance by the College, no faculty member of non-European ancestry had ever been awarded a tenure position in the past.<sup>61</sup> However, no other members of the sociology department had been recommended for nor granted tenure during this period either.<sup>62</sup>

Al-Khazraji was denied a tenure position in 1978 based upon the Tenure Committee's (the Committee) negative recommendation to the Board of Trustees. After Al-Khazraji requested reconsideration of the decision, the Faculty Senate authorized the Faculty Affairs Committee to review the Committee's decision. In January 1979, the Faculty Affairs Committee recommended that the Committee reconsider Al-Khazraji's tenure application. However, in February, the Committee declined to so act.<sup>63</sup>

During this period of internal review, Al-Khazraji was discouraged from pursuing outside remedies until a final decision had been reached by the College.<sup>64</sup> He was ultimately terminated from his faculty position in May 1979.<sup>65</sup>

#### B. *Procedural History*

##### 1. The Pennsylvania Human Relations Commission

Al-Khazraji initially sought relief from the Pennsylvania Human

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59. See *Al-Khazraji v. Saint Francis College*, 784 F.2d 505, 507 (3d Cir. 1986), *aff'd* 107 S. Ct. 2022 (1987); Respondent's Brief in Opposition to Petition for a Writ of Certiorari at 1, *Al-Khazraji v. Saint Francis College*, 784 F.2d 505 (3d Cir. 1986) (No. 85-2169), *aff'd*, 107 S. Ct. 2022 (1987) [hereinafter *Opposition Brief*]; Brief for Respondent, *supra* note 12, at 2.

60. Saint Francis College [hereinafter the College], a private college in Loretto, Pennsylvania, is the primary petitioner. The remaining petitioners are nine individual members of the College's Tenure Committee. See *Al-Khazraji*, 784 F.2d at 508.

61. See Brief for Respondent, *supra* note 12, at 2.

62. See Petitioner's Brief in Support of Petition for a Writ of Certiorari at 44-45, *Al-Khazraji v. Saint Francis College*, 784 F.2d 505 (3d Cir. 1986) (No. 85-2169), *aff'd*, 107 S. Ct. 2022 (1987). Petitioner notes that the only person to be granted tenure since Al-Khazraji's denial was respondent's wife. *Id.*

63. *Al-Khazraji*, 784 F.2d at 507.

64. *Id.*

65. *Id.*

Relations Commission<sup>66</sup> (PHRC) in September 1978.<sup>67</sup> His experience with PHRC can best be described as a bureaucratic nightmare. He was initially advised by PHRC that no action could be taken in 1978 since "impending termination . . . was considered insufficient reason to docket the charge or to proceed with the investigation."<sup>68</sup> Prior to 1980, PHRC maintained an express policy against processing tenure denial claims until actual termination from employment.<sup>69</sup>

Based upon this advice, Al-Khazraji postponed filing a charge with PHRC and the Equal Employment Opportunity Commission<sup>70</sup> (EEOC) until after his termination in May 1979—more than one year following rejection of his initial application for tenure. One year later, the PHRC dismissed Al-Khazraji's complaint as untimely and as superseded by a civil action filed in state court in 1979.<sup>71</sup> PHRC then indicated that Al-Khazraji *should* have filed his charge with that agency in 1978.<sup>72</sup> In August 1980, the EEOC also dismissed Al-Khazraji's claim and issued its standard right to sue letter.<sup>73</sup>

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66. See The Pennsylvania Human Relations Act, PA. STAT. ANN. tit. 43, § 962(b) (Purdon Supp. 1987).

67. See *Al-Khazraji*, 784 F.2d at 507.

68. *Id.* at 507 & n.3.

69. *Id.* See also Brief for Respondent, *supra* note 12, at 4.

70. The Equal Employment Opportunity Commission (EEOC) may not act on complaints filed with state authorities until 60 days have elapsed from the date of filing. 42 U.S.C. § 2000e-5(c) (1982). See generally 2 C. ANTIEAU, FEDERAL CIVIL RIGHTS ACTS, CIVIL PRACTICE § 483 (2d ed. 1980 & Supp. 1987); 1 W. CONNOLLY & M. CONNOLLY, A PRACTICAL GUIDE TO EQUAL EMPLOYMENT OPPORTUNITY § 4.05 (rev. ed. 1987).

71. In May 1979, Al-Khazraji initiated a suit against the College in state court, which was ultimately dismissed with prejudice in 1983 for failure to prosecute. *Al-Khazraji*, 784 F.2d at 507. Pursuit of administrative remedies does not foreclose the individual's right to file a civil complaint. However, the individual is required to await the receipt of a right to sue letter from the PHRC following dismissal of the administrative action. See PA. STAT. ANN. tit. 43, § 962(c) (Purdon Supp. 1987). For a discussion of the right to sue process, see *infra* note 73.

72. See Brief for Respondent, *supra* note 12, at 4. Prior to 1980, the Third Circuit had held that the statute of limitations period for Title VII claims began when the employee was in fact terminated. See *Ricks v. Delaware State College*, 605 F.2d 710 (3d Cir. 1979), *rev'd*, 449 U.S. 250 (1980).

73. A "right to sue" letter has its statutory basis in section 2000e-5(f)(1) of Title VII. 42 U.S.C. § 2000e-5(f)(1) (1982). Upon filing of the initial charge with the EEOC, the EEOC has 180 days in which to initiate a civil action or secure a conciliation agreement with the respondent. At the expiration of this period, or upon the EEOC's dismissal of the charge, the EEOC must then notify the charging party (complainant) that he has 90 days in which to initiate civil suit against the respondent. See C. ANTIEAU, *supra* note 70, § 494; W. CONNOLLY & M. CONNOLLY, *supra* note 70, § 4.06[2]; B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 238-42 (2d ed. Supp. 1987).

## 2. The District Court

The history of Al-Khazraji's encounter with the United States District Court for the Western District of Pennsylvania also begins with confusion. Al-Khazraji filed three complaints with the district court: (1) a *pro se* complaint against the College only, alleging violation of Title VII; (2) an amended complaint, filed with the aid of counsel, against the College and nine individual members of the Committee, which included pendent state claims and alleged violations of Title VII and sections 1981, 1983,<sup>74</sup> 1985,<sup>75</sup> and 1986<sup>76</sup> of Title 42; and (3) a second amended complaint, filed *pro se*, against the College and *eight* members of the Committee, alleging only Title VII violations.<sup>77</sup>

The district court concluded that the statute of limitations for filing the Title VII claim began to run at the denial of Al-Khazraji's tenure application—not when he was terminated or had exhausted internal grievance procedures.<sup>78</sup> As to the section 1981 claim, the court determined that Pennsylvania's six-year statute of limitations on contract claims—not the two-year limitation on personal injury actions—should be the applicable period.<sup>79</sup> Thus, the section 1981 claim was not time-barred.

Al-Khazraji's original section 1981 claim had been based on "national origin, religion, and/or race"; however, his second amended complaint did not contain the word "race."<sup>80</sup> The court viewed this omission as insignificant, however, and considered the claim actionable even though claims based on national origin or ancestry were generally excluded from section 1981.<sup>81</sup>

The complaint, however, was ultimately dismissed by another district court judge who granted the College's summary judgment motion. This judge did not consider a claim based on Arab ancestry to be actionable under section 1981.<sup>82</sup>

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74. 42 U.S.C. § 1983 (1982) (civil action for deprivation of rights).

75. 42 U.S.C. § 1985 (1982) (conspiracy to interfere with civil rights).

76. 42 U.S.C. § 1986 (1982) (action for neglect to prevent conspiracy).

77. *Al-Khazraji v. Saint Francis College*, 523 F. Supp. 386, 387 (W.D. Pa. 1981), *rev'd*, 784 F.2d 505 (3d Cir. 1986), *aff'd*, 107 S. Ct. 2022 (1987).

78. *Id.* The district court relied on the Supreme Court's holding in *Delaware State College v. Ricks*, 449 U.S. 250 (1980).

79. *Al-Khazraji*, 523 F. Supp. at 390; see PA. STAT. ANN. tit. 42, § 5524(7) (Purdon Supp. 1987) (two-year statutory period for intentional personal injury claims); PA. STAT. ANN. tit. 42, § 5527 (Purdon Supp. 1987) (six-year statutory period for contract claims).

80. *Al-Khazraji*, 523 F. Supp. at 391 n.13.

81. *Id.* at 391 (claims based on Arab ancestry not actionable under section 1981) (citing *Saad v. International Sec. Serv., Inc.*, 465 F. Supp. 33 (D.D.C. 1978)). Compare 2 C. ANTIEAU, *supra* note 70, § 23 (claims based on national origin held actionable under section 1981). See, e.g., *Alizadeh v. Safeway Stores, Inc.*, 802 F.2d 111 (5th Cir. 1986) (Iranian); *Erebia v. Chrysler Plastic Prod. Corp.*, 772 F.2d 1250 (6th Cir. 1985) (national origin closely tied to race discrimination), *cert. denied*, 475 U.S. 1015 (1986).

82. *Al-Khazraji*, 784 F.2d at 509. The inconsistency of interpretation of section

### 3. The Third Circuit

Al-Khazraji appealed to the Third Circuit Court of Appeals, which affirmed the disposition of the Title VII claim and reversed the dismissal of the section 1981 claim.<sup>83</sup> The court first analyzed the statute of limitations issue.

#### a. The Statute of Limitations

Section 1981 does not specify any time limitations for filing a claim.<sup>84</sup> Consequently, federal courts are required to apply the state statutory period which is most analogous to civil rights actions.<sup>85</sup> Since 1977, the Third Circuit had applied Pennsylvania's six-year contract statute of limitations to civil rights cases.<sup>86</sup> However, in *Goodman v. Lukens Steel Co.*,<sup>87</sup> the Third Circuit concluded that section 1981 has a much broader focus than mere contractual rights.<sup>88</sup> Consequently, it held that the two-year personal injury statute of limitations was more applicable to section 1981 claims.<sup>89</sup>

The court then undertook a three-part analysis as outlined in *Chevron Oil Co. v. Huson*<sup>90</sup> to determine whether the two-year period should be applied retroactively to Al-Khazraji's claim. Retroactive application would effectively bar the claim and would leave Al-Khazraji without any further relief; thus defeating his reasonable expectations. The court further stated: "It would produce the most 'substantial inequitable results' to hold that [Al-Khazraji] 'slept on his rights' at a time when he could not have known the time limitation that the law imposed on him."<sup>91</sup> The court, therefore, declined

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1981 within this district court is representative of that which existed nationwide. See *supra* note 2.

83. Special treatment is given to the Third Circuit's analysis since it was heavily relied on by the Supreme Court.

84. See 42 U.S.C. § 1981 (1982).

85. 42 U.S.C. § 1988 (1982); see *Johnson v. Railway Express Agency*, 421 U.S. 454, 462 (1975). The state statutory period most analogous to civil rights actions controls section 1981 claims.

86. *Al-Khazraji*, 784 F.2d at 511; see PA. STAT. ANN. tit. 42, § 5527 (Purdon Supp. 1987).

87. 777 F.2d 113 (3d Cir. 1985), *aff'd*, 107 S. Ct. 2617 (1987).

88. *Goodman*, 777 F.2d at 119.

89. *Id.* at 120; see PA. STAT. ANN. tit. 42, § 5524(7) (Purdon Supp. 1987) (two-year statute of limitations for intentional personal injury actions).

90. 404 U.S. 97 (1971). The three-part test requires an analysis of: (1) whether the proposed decision would establish a new principle of law; (2) whether retroactive application would retard or further the purpose of the rule; and (3) whether retroactivity would result in harsh inequities. *Id.* at 106-07 (citations omitted).

91. *Al-Khazraji*, 784 F.2d at 514 (quoting *Chevron*, 404 U.S. at 108).

to retroactively impose the two-year statute of limitations period on Al-Khazraji's section 1981 claim.

*b. "Race" discrimination under section 1981*

The Third Circuit then undertook a detailed analysis of the legislative history of the 1866 Act, the judicial interpretation of section 1981, and encyclopedic and dictionary definitions of race.<sup>92</sup> The court reasoned that "Congress's purpose was to ensure that all persons be treated equally, without regard to color or race, which we understand to embrace, at the least, membership in a group that is ethnically and physiognomically distinctive."<sup>93</sup>

Viewing broadly the scope of section 1981, the court allowed Al-Khazraji's claim based on his Arab ancestry to proceed. The court favored the application of section 1981 in this situation by reasoning that Arabs could easily be victims of racial prejudice: "prejudice is as irrational as is the selection of groups against whom it is directed. It is thus a matter of practice or attitude in the community, it is a usage or image based on all the mistaken concepts of 'race.'"<sup>94</sup>

In a concurring opinion, Judge Adams expressed concern that this expansive view of race converted section 1981's racial focus into one based on national origin.<sup>95</sup> He asserted that such a broadening was best left to Congress, since the majority's opinion would now entitle "virtually any nationality" to pursue a section 1981 claim.<sup>96</sup>

#### IV. ANALYSIS OF THE COURT'S OPINION

##### *A. Justice White's Majority Opinion*

Writing for the majority, Justice White quickly dispensed with the statute of limitations issue.<sup>97</sup> The Court agreed with the Third Circuit that Al-Khazraji initiated his suit at a time when the statute of limitations was clearly six years.<sup>98</sup> To retroactively impose a two-year statutory period on the claim, the Court concluded, "would be

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92. *Al-Khazraji*, 784 F.2d at 514-18.

93. *Id.* at 517 n.14.

94. *Id.* (quoting *Manzanares v. Safeway Stores, Inc.*, 593 F.2d 968, 971 (10th Cir. 1979)).

95. *Id.* at 520.

96. *Id.* Justice Brennan's concurring opinion in *Saint Francis College* is in accord with Judge Adams' concerns. See *Saint Francis College v. Al-Khazraji*, 107 S. Ct. 2022, 2029 (1987) (Brennan, J., concurring); see also *infra* notes 109-113 and accompanying text.

97. The Supreme Court granted certiorari limited to two issues: (1) the appropriate statute of limitations for a section 1981 claim; and (2) the availability of a section 1981 action to an individual of Arab descent. *Saint Francis College*, 107 S. Ct. at 2025.

98. *Id.* at 2025. For a broader analysis of the statute of limitations issue, see *supra* notes 84-91 and accompanying text.

manifestly inequitable."<sup>99</sup>

The opinion then focused on the proper interpretation of race for purposes of section 1981. The Court first pointed out that although section 1981 does not expressly refer to race,<sup>100</sup> "judicial interpretation has construed it to have this application."<sup>101</sup> The Court rejected the College's contention that Al-Khazraji, as an Arab, was a member of the "Caucasian" race, and therefore could not maintain his section 1981 claim against other Caucasians.<sup>102</sup>

The Court noted the existence of a common twentieth century notion that recognizes only "three major human races—Caucasoid, Mongoloid, and Negroid."<sup>103</sup> However, the Court also indicated that such racial applications are arbitrary and do not realistically provide guidance as to the differences between various populations.<sup>104</sup> The Court further stated: "It has been found that differences between individuals of the same race are often greater than the differences between the 'average' individuals of different races . . . . [Some] scientists . . . conclude that racial classifications are for the most part sociopolitical, rather than biological, in nature."<sup>105</sup> The Court cited extensively to nineteenth century dictionaries and encyclopedias in support of its view that framers of the 1866 Act did not consider race in popular twentieth century terms.<sup>106</sup> Those sources define race in terms of ethnic groups, descendants of a common ancestor, and as a family, tribe, people or nation.<sup>107</sup> Similarly, the congressional debates surrounding the enactment of the 1866 Act and the 1870 Act lend strong support to the notion that nineteenth century legislators did not restrict their thinking to a three-race concept.<sup>108</sup>

Here the Court marks new ground by definitively announcing that:

Congress intended to protect from discrimination *identifiable* classes of persons who are subjected to intentional discrimination *solely* because of their *ancestry or ethnic characteristics*. Such discrimination is *racial* discrimination

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99. *Id.* at 2025-26.

100. Section 1981 refers only to "all persons" and to "white citizens," and omits any references to "race." See 42 U.S.C. § 1981 (1982). However, "race" and "color" are referred to in section 1 of the 1866 Act and in section 17 of the 1870 Act. See *supra* notes 11 and 28.

101. *Saint Francis College*, 107 S. Ct. at 2026 (citing *Runyon v. McCrary*, 427 U.S. 160, 168, 174-75 (1976)).

102. *Id.*

103. *Id.* at 2026 n.4 (citations omitted).

104. *Id.*

105. *Id.*

106. *Id.* at 2026-27.

107. *Id.* at 2027.

108. *Id.* at 2027-28.

that Congress intended § 1981 to forbid, *whether or not it would be classified as racial in terms of modern scientific theory*.<sup>109</sup>

The Court went beyond the Third Circuit's concept of a "distinctive physiognomy"<sup>110</sup> and thus arrived at an expansive notion of race for section 1981 purposes. Ultimately, the Court concluded that Al-Khazraji's claim of intentional discrimination based on his Arab *ancestry* was sufficient to state a cause of action under section 1981.

#### B. Justice Brennan's Concurring Opinion

In a brief concurrence, Justice Brennan sought to emphasize that there is no bright line between "ancestry or ethnic characteristics" and "national origin."<sup>111</sup> He asserted that "ancestry" indicates the "ethnic group from which [one] descended"; whereas, "national origin" denotes one's place of birth.<sup>112</sup>

Noting the legal overlap as related to Title VII claims,<sup>113</sup> Justice Brennan emphasized that pure national origin claims (i.e., place of birth) could not constitute a section 1981 claim, even though they would be actionable under Title VII.<sup>114</sup> Thus, only a narrow class of claims—those based on national origin—would not be cognizable under section 1981.<sup>115</sup>

### V. IMPACT OF THE COURT'S DECISION

The Court's effort to definitively resolve the long-standing dispute over who can initiate a claim of racial discrimination under section

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109. *Id.* at 2028 (emphasis added).

110. See *Al-Khazraji v. Saint Francis College*, 784 F.2d 505, 517 (3d Cir. 1986).

111. *Saint Francis College*, 107 S. Ct. at 2028 (Brennan, J., concurring).

112. *Id.* *Ancestry* is defined as: "1. The relation or condition of ancestors; progenitorship; ancestral lineage or descent." I THE OXFORD ENGLISH DICTIONARY 311 (1933 & reprint 1978). Similarly, *ancestor* is defined as: "1. One from whom a person is descended, either by the father or mother; a progenitor, a forefather." *Id.* The definition for *nation* incorporates many of the same concepts: "1. An extensive aggregate of persons, so closely associated with each other by common descent, language, or history, as to form a distinct race or people, usually organized as a separate political state and occupying a definite territory." VII THE OXFORD ENGLISH DICTIONARY 30 (1933 & reprint 1978). *National* is construed as: "1. Of or belonging to a [or the] nation; affecting, or shared by, the nation as a whole. . . . 2. Peculiar to the people of a particular country, characteristic or distinctive of a nation." *Id.* at 31.

113. Title VII provides relief from national origin discrimination, as well as race discrimination. To assist the EEOC in analyzing national origin claims, the Code of Federal Regulations sets forth a definition of national origin. The definition includes, in relevant part: "an individual's, or his or her ancestor's, place of origin; or . . . physical, cultural or linguistic characteristics of a national origin group." 29 C.F.R. § 1606.1 (1987). Thus, at least as far as the EEOC is concerned, ancestry and national origin are clearly interrelated.

114. *Saint Francis College*, 107 S. Ct. at 2029 (Brennan, J., concurring).

115. However, some commentators have already interpreted *Saint Francis College* as recognizing claims of national origin under section 1981. See 2 C. ANTIEAU, *supra* note 70, § 23, at 37 (Supp. 1987). Antieau interprets the Court's references to "ancestry and ethnic characteristics" to mean "national origin."

1981 creates significant issues and perhaps more confusion for the federal courts. However, the greatest impact of *Saint Francis College* will surely be the interplay of section 1981 and Title VII claims.

A key purpose of Title VII is to promote conciliation and resolution of employment discrimination claims outside of the courtroom.<sup>116</sup> It is "aimed at the *consequences* of employment practices, not at their *motivation*."<sup>117</sup> Title VII claims may be based, in addition to race, on color, religion, sex, or national origin.<sup>118</sup>

The legislative history of Title VII demonstrates that Congress envisioned it as a coordinated remedial package against employment discrimination, when coupled with section 1981.<sup>119</sup> Unlike the restriction against claims of *intentional* discrimination under section 1981, however, Title VII encompasses disparate impact cases as well.<sup>120</sup> As such, Title VII is a "comprehensive solution for the problem of invidious discrimination in employment . . ."<sup>121</sup>

Consequently, remedies available under Title VII and section 1981 are considered "separate, distinct, and independent."<sup>122</sup> Title VII is limited to only those claims arising out of certain employment relationships.<sup>123</sup> Section 1981, however, is a broad remedy against all forms of intentional race discrimination.<sup>124</sup> Whereas section 1981 focuses on economic relief, Title VII provides assistance in investiga-

116. *Johnson v. Railway Express Agency*, 421 U.S. 454, 465 (1975); see 42 U.S.C. § 2000e-5(b) (1982); 2 C. ANTIEAU, *supra* note 70, § 370; 1 W. CONNOLLY & M. CONNOLLY, *supra* note 70, § 5.04[1]; B. SCHLEI & P. GROSSMAN, *supra* note 73, at 215-16.

117. See 2 C. ANTIEAU, *supra* note 70, at 370 (emphasis added).

118. 42 U.S.C. § 2000e-2 (1982).

119. *Johnson*, 421 U.S. at 459. Title VII and section 1981 "procedures augment each other and are not mutually exclusive." *Id.* Additionally, Title VII and section 1981 constitute "a flexible network of remedies to guarantee equal employment opportunities." *Id.* (Marshall, J., concurring and dissenting).

120. See *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 386 (1982); *EEOC v. Borden's, Inc.*, 724 F.2d 1390 (9th Cir. 1984) (Title VII claims of adverse impact and disparate treatment prevailing). See generally 2 C. ANTIEAU, *supra* note 70, § 380; B. SCHLEI & P. GROSSMAN, *supra* note 73, at 297-329.

121. *Johnson*, 421 U.S. at 459.

122. *Id.* at 461.

123. Title VII applies to employers engaged in interstate commerce, who have 15 or more employees. 42 U.S.C. § 2000e(b) (1982). Note that various parts of the Civil Rights Act of 1964 address other aspects of discrimination. For example, Title II (public accommodations), 42 U.S.C. § 2000a (1982); Title IV (public education), 42 U.S.C. § 2000c (1982); Title VI (federally-funded programs), 42 U.S.C. § 2000d (1982).

124. See *supra* notes 47-49 and accompanying text; 1 C. ANTIEAU, *supra* note 70, § 20. See, e.g., *Fiedler v. Marumsco Christian School*, 631 F.2d 1144 (4th Cir. 1980) (applying section 1981 to student expelled from school on basis of race); *Wright v. Salisbury Club, Ltd.*, 632 F.2d 309 (4th Cir. 1980) (prohibiting discrimination on basis of race by club providing recreational facilities); *Morgan v. Parcener's, Ltd.*, 493 F. Supp. 180



tion,<sup>125</sup> conciliation,<sup>126</sup> counsel,<sup>127</sup> and court costs.<sup>128</sup>

Nonetheless, throughout the 1970's, section 1981 gained popularity as a remedy for racial employment discrimination claims due to its inherently favorable economic and procedural incentives.<sup>129</sup> Plaintiffs in section 1981 actions are entitled to both equitable and legal relief, including compensatory and punitive damages.<sup>130</sup> Claims for emotional distress are also viable under section 1981.<sup>131</sup> Furthermore, back pay awards under section 1981 are not restricted to the two-year limitation imposed by Title VII.<sup>132</sup> Attorneys' fees may be awarded, however, in either proceeding.<sup>133</sup>

Procedurally, a section 1981 claimant is entitled to a jury trial—an additional benefit not available under Title VII.<sup>134</sup> Moreover, a section 1981 claim may be filed directly in federal court without first exhausting Title VII and state administrative remedies.<sup>135</sup> Consequently, section 1981 claimants already enjoy significant economic and procedural advantages over Title VII claimants.<sup>136</sup>

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(W.D. Okla. 1978) (refusal to rent housing based on race actionable under section 1981).

125. 42 U.S.C. § 2000e-5(b) (1982).

126. *Id.*

127. *Id.* § 2000e-5(f)(1).

128. *Id.*; see *Payne v. Travenol Laboratories, Inc.*, 74 F.R.D. 14 (N.D. Miss. 1976) (costs incurred in Title VII litigation recoverable), *cert. denied*, 459 U.S. 1038 (1982); see also 42 U.S.C. § 2000e-5(k) (1982) (availability of attorneys' fees in Title VII actions).

129. *E.g.*, *Sabol v. Snyder*, 524 F.2d 1009 (10th Cir. 1975); *Young v. International Tel. & Tel. Co.*, 438 F.2d 757 (3d Cir. 1971); *Sanders v. Dobbs Houses, Inc.*, 431 F.2d 1097 (5th Cir.), *cert. denied*, 401 U.S. 948 (1971).

130. Section 1981 claimants are entitled to invoke federal court jurisdiction under 28 U.S.C. § 1343(4), which provides for "damages or . . . equitable or other relief under any Act of Congress providing for the protection of civil rights . . ." See *Johnson v. Railway Express Agency*, 421 U.S. 454, 460 (1975) (comparing remedies under Title VII and section 1981); 2 C. ANTIEAU, *supra* note 70, § 520 (punitive and compensatory damages not typically available in Title VII actions).

131. See *Johnson*, 421 U.S. at 460 (discussing the possibility of awarding punitive damages under section 1981); see, *e.g.*, *Smith v. Anchor Bldg. Corp.*, 536 F.2d 231 (8th Cir. 1976).

132. 42 U.S.C. § 2000e-5(g) (1982). See generally B. SCHLEI & P. GROSSMAN, *supra* note 73, at 340-55.

133. 42 U.S.C. § 2000e-5(k) (1982). See generally B. SCHLEI & P. GROSSMAN, *supra* note 73, at 357-66.

134. Section 2000e-5(f)(4)-(5) requires that a district court judge or master be appointed to hear and decide the Title VII case. 42 U.S.C. § 2000e-5(f)(4)-(5) (1982). See also *Lehman v. Nakshian*, 453 U.S. 156, 164 (1981) (stating "no right to trial by jury in cases arising under Title VII").

135. See 42 U.S.C. § 2000e-5(f) (1982). A civil action may be commenced under Title VII once the administrative charge has been disposed. See also *Holt v. Continental Group, Inc.*, 708 F.2d 87 (2d Cir. 1983) (indicating section 1981 imposes no requirement that administrative remedies must first be exhausted before filing civil suit), *cert. denied*, 465 U.S. 1030 (1984). See generally 2 C. ANTIEAU, *supra* note 70, § 484.

136. See *Johnson*, 421 U.S. at 460; 2 C. ANTIEAU, *supra* note 70, § 530; 1 W. CONNOLLY & M. CONNOLLY, *supra* note 73, § 1.02[3](a)-(b).

The decision in *Saint Francis College* will further frustrate Title VII's conciliatory approach to resolving employment discrimination claims on two fronts. First, confusion now abides as to whether national origin claims, actionable under Title VII, are actionable under section 1981. Justice Brennan's concurring opinion indicates that they are not.<sup>137</sup> However, at least one noted commentator has already interpreted *Saint Francis College* to, in fact, sanction national origin claims.<sup>138</sup> Thus, the controversy has commenced.

The confusing language can be found at the conclusion of the Court's opinion: "If respondent on remand can prove that he was subjected to intentional discrimination based on the fact that he was born an Arab, rather than *solely* on the place or nation of his origin, or his religion, he will have made out a case under § 1981."<sup>139</sup> This interplay of ancestry and "place or nation of origin" will undoubtedly create confusion for federal courts trying to legitimately distinguish between the two concepts.<sup>140</sup> Are they to assume that both ancestry *and* national origin must be pleaded? Although the Court indicates that national origin *alone* is not sufficient to state a claim under section 1981, the weight to be afforded considerations of national origin remains uncertain.

This issue is further complicated by the fact that neither "race" nor "national origin" is mentioned in section 1981. Thus, the federal courts must resort to outside resources, including prior judicial interpretation, to determine the proper definitions and scope of these terms. With inconsistent precedents upon which to rely, these courts have little to guide their deliberations. Consequently, perceptive litigants will ensure their claims are couched in terms of race, and avoid unnecessary references to national origin. Similarly, legitimate national origin claimants will attempt to circumvent Title VII's limited remedies and pursue a section 1981 "race" claim.

The second aspect of *Saint Francis College* which will frustrate Title VII principles is the Court's reaffirmation that the appropriate statute of limitations for section 1981 claims is that which is most closely related to personal injury, rather than contract, actions. Com-

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137. See *supra* notes 109-112 and accompanying text.

138. See 1 C. ANTIEAU, *supra* note 113.

139. *Saint Francis College*, 107 S. Ct. at 2028 (emphasis added). See *Al-Khazraji v. Saint Francis College*, 784 F.2d 505, 520 (3d Cir. 1986) (Adams, J., concurring). Judge Adams asserts that "a statute aimed at racial discrimination is being converted into one also focused on national origin discrimination." *Id.*

140. See *supra* notes 81 and 110.

bined with an earlier decision which held that the filing of a Title VII claim does *not* toll the statute of limitations for a section 1981 claim,<sup>141</sup> claimants now have great incentive for promptly commencing an action under section 1981.

With a typically shorter statute of limitations period under applicable tort law, claimants can no longer afford to await determination of their Title VII claim before filing suit under section 1981. Such a result serves only to diminish congressional efforts "to avoid unnecessary and costly litigation . . ."<sup>142</sup> In fact, some members of the Court have recently acknowledged that the shorter statute of limitations will effectively force plaintiffs into this untenable position.<sup>143</sup>

Finally, the obvious immediate impact of *Saint Francis College* is that it significantly broadens the potential class of claimants under section 1981. Groups such as Hispanics, Latinos, and Jews,<sup>144</sup> which have been inconsistently precluded from pursuing section 1981 claims, will no longer be subjected to such piecemeal decision-making—provided, of course, that their claims are properly phrased in racial terms. Thus, section 1981 will have finally achieved the goal of its original framers in 1866 by providing a viable remedy for *anyone* who is discriminated against based upon "racial" characteristics, however defined.

Regrettably, with this now-solid vehicle virtually open to all, the federal courts can reasonably expect even greater congestion as the attractive incentives offered by section 1981 become even more widely pursued. Claimants, attorneys, and judges will experience increased frustration with an already over-burdened court system. Ironically, such discontent will lead to pre-trial settlements, thus depriving claimants of attractive economic possibilities like punitive damages. Yet, even without the burdens of trial, the federal courts must still expend their limited resources to accommodate the extra pleadings, motions, and discovery—as well as resolve fine distinctions between race and national origin. The fact that such an impact must result is inevitable in this melting pot of modern American society which tends to display a rather quick trigger-finger for litigation.

## VI. CONCLUSION

*Saint Francis College* has been heralded as a victory for those minority groups previously unrecognized as a "distinct race" for pur-

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141. *Johnson*, 421 U.S. at 466-67.

142. *Id.* at 473 (Marshall, J., concurring and dissenting).

143. See *Goodman v. Lukens Steel Co.*, 107 S. Ct. 2617, 2630 n.11 (1987) (Brennan, Marshall & Blackmun, J.J., concurring and dissenting).

144. See, e.g., *Shaare Tefila Congregation v. Cobb*, 107 S. Ct. 2019 (1987).

poses of section 1981.<sup>145</sup> However, as with any victory, someone must lose. In this case, the federal courts must bear the burden of Al-Khazraji's victory.

In attempting to set at rest the congressional intent of the Civil Rights Act of 1866 and the Voting Rights Act of 1870, the Court may have unwittingly ignored Congress's twentieth-century intent to provide a *coordinated* set of remedies for racial discrimination. Working in a nineteenth-century vacuum, the Court has further undercut the desirability, and consequently the effectiveness, of Title VII remedies.

In an era of alternative dispute resolution—so compatible with Title VII principles—the Court has provided significant *disincentives* for claimants to pursue these federal and state administrative remedies. For to do so, claimants must risk losing a viable section 1981 claim should Title VII conciliation efforts extend beyond the shorter tort statute of limitations. Further, under Title VII, claimants have no opportunity to reap the extensive economic and procedural benefits now widely accessible under section 1981.

The perceived victory of *Saint Francis College* is doomed to be short-lived; in the final analysis, reconstructive surgery will be necessary to repair the damage. The ultimate resolution of the problems created by *Saint Francis College* lies with Congress's ability to refashion a "coordinated" program between Title VII and section 1981, as originally envisioned in 1964. To be effective, this effort must include a legislative determination of the proper interplay, if any, between race, national origin, and ancestry.

BARBARA A. BAYLISS

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145. See L.A. Times, May 19, 1987, at 1, col. 2; N.Y. Times, May 19, 1987, at 1, col. 3.

